SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 143

JAMES PALMER,

Appellant,

v.

CITY OF EUCLID, OHIO,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLANT

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APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLANT

OPINIONS BELOW

No opinions were delivered by any of the courts below.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on December 18, 1968 (A. 30). A petition for rehearing was denied on January 22, 1969 (A. 30). The ap-

peal was filed in this Court on April 22, 1969, and probable jurisdiction was noted on May 4, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

United States Constitution

Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment V:

> * * * nor shall any person * * * be compelled in any criminal case to be a witness against himself * * *

Amendment XIV, Section 1, Clause 2:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ordinance of the City of Euclid, Ohio

Section 583.01

> It shall be unlawful for any suspicious person to be within the Municipality. The following shall be deemed suspicious persons:
>
> * * *

(e) Any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself;

QUESTIONS PRESENTED

I.

Whether an ordinance providing for imprisonment of suspicious persons, defined as "Any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself;" is so vague and lacking in ascertainable standards of guilt as to fail to give fair notice of what is prohibited, invite arbitrary and discriminatory enforcement, and sweep within its ambit constitutionally protected conduct, so as to be void as in conflict with the Fourteenth Amendment's guarantee of due process of law?

II.

Whether, consistent with the Fifth Amendment's privilege against self-incrimination, an ordinance may compel a suspect to "give a satisfactory account of himself" under pain of fine and/or imprisonment for failure or refusal to do so?

III.

Whether the Euclid suspicious persons ordinance unconstitutionally infringes freedom of movement by allowing arrest, detention, and conviction on suspicion in violation of the Fourth and Fourteenth Amendments?

STATEMENT

On August 21, 1967, James Palmer was convicted after a jury trial of being a suspicious person in violation of Section 583.01(e) of the Ordinances of the City of Euclid, Ohio (A. 26).

The evidentiary basis for the conviction was primarily the testimony of one Joseph Zupanic, a member of the City of Euclid Police Department (A. 4). Zupanic testified that in the early morning hours of April 19, 1967, while he was working his off-duty job patrolling the Indian Hills Colony Apartment complex (A. 5), his suspicion was aroused by Palmer's automobile travelling at a very slow rate of speed without headlights in the driveway of the parking lot (A. 5). Upon observation he became even more suspicious, because he saw a "colored female" alight from the passenger side of the car and enter the building (A. 5), and he claimed to know that no "colored females" lived at the apartments (A. 7, 21).*

Palmer then turned his headlights on, pulled his car onto the street and parked (A. 5-6). As the patrolman approached to investigate, he noticed that Palmer had a microphone in his hand and was talking on a two-way radio (A. 6). Zupanic testified that he asked Palmer for identification and asked him to get out of the vehicle, and that Palmer got out and showed him his driver's license (A. 6). Zupanic put Palmer up against the car and searched him for weapons (A. 7).

In response to a question about the identity of the female, Palmer indicated that she was just a friend and that he didn't know where she had gone (A. 6). Whereupon Zupanic marched Palmer into the building at gunpoint (A.

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*The Indian Hills Colony Apartments were of such magnitude that Patrolman Zupanic estimated that maybe 2,000 cars would be parked there at night (A. 12).

8) and called the police department for assistance (A. 6). A thorough search of the premises failed to find the female (A. 6).

Palmer subsequently agreed to take the police officer to the apartment where he thought the female had gone, but when the party within denied that any colored female had come into the apartment, Palmer was taken to the police station and his car was towed there for investigation (A. 6).

Zupanic testified that during the course of interrogation at the station, appellant gave him three different home addresses, said he didn't know the female's name (A. 7), and gave no satisfactory explanation of his presence at the apartments (A. 20) beyond that of dropping his friend off (A. 7).

A lengthy and meandering cross-examination of Zupanic by Palmer* disclosed that all of his observation (A. 9-11), his search of Palmer (A. 7), his search of the apartment building (A. 13), his check of the stolen car sheet (A. 12), and his interrogation of Palmer at the police station (Tr. 53-58) produced not a scintilla of evidence of any substantive offense committed by either Palmer or the "colored female" (A. 21). Further, there was no report of any crime having been committed (A. 18).

James Palmer did not testify in his own defense; the court charged the jury in the language of the ordinance without further explanation or limitation (A. 24-25); and the jury found Palmer guilty of being a suspicious person (A. 26). The court sentenced him to serve 30 days in the Cuyahoga County Jail and to a fine of $50.00 and costs (A. 26).

Palmer's motion for a new trial based on the constitutional invalidity of the ordinance under which he had been

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*James Palmer, although not a lawyer, conducted his own defense (A. 12).

convicted was denied (A. 27). On appeal to the Court of Appeals of Cuyahoga County, Palmer's conviction was affirmed without opinion (A. 28). Palmer's appeal to the Ohio Supreme Court was dismissed on the ground that no substantial constitutional question existed (A. 30). After rehearing was denied (A. 30), Palmer appealed to this Court, which noted probable jurisdiction on May 4, 1970 (A. 31).

SUMMARY OF ARGUMENT

I.

A. *Ordinance fails to give fair notice by reason of its vagueness.* No ascertainable standard of conduct is provided by any of its elements. "Wanders" has been interpreted by diverse judges to include *only innocent conduct, only criminal conduct,* and *both innocent and culpable conduct.* "Found abroad at late or unusual hours of the night" is simply a nocturnal version of wandering and is subject to the same vagaries of interpretation. The phrase "without visible or lawful business" simply begs the question of when wandering itself is lawful business. "Does not give satisfactory account of himself" raises a host of questions as to what kind of satisfaction and whose satisfaction is required. The uncertainties in this phrase has led nine lower federal and state courts to strike down statutes containing it. Nor does the phrase "suspicious person" lend any finite content to this otherwise vague ordinance.

B. *Ordinance invites arbitrary and discriminatory enforcement by reason of its vagueness.* The requirement that suspects give a "satisfactory account" conditions their freedom of movement on the suffrance of any police officer. Thus, the ordinance cannot stand consistent with *Shuttlesworth v. City of Birmingham,* 382 U.S. 399 (1966).

The vagueness of its other elements facilitates the employment of constitutionally illegitimate bases for the selection of subjects from whom "satisfactory accounts" are de-

manded. A satisfactory account was demanded of James Palmer in part because "a colored female" alighted from his car, when the police officer knew that no colored females lived in the area (A. 5, 7, 20-21). National statistics and empirical studies of police behavior demonstrate that Negroes are disproportionately burdened by suspicious person arrests. But even if race be viewed as a neutral and rational basis for determining who is "out of place" it may not be so employed, because it is the product of, and contributes to, a long and tragic national history of housing discrimination and segregation. A virtually all-white City of Euclid would not otherwise exist in a county having a nonwhite population in excess of fifteen per cent.

The ordinance's capacity for arbitrary enforcement also includes the potential for suppressing non-criminal but unconventional persons and behavior, a substantial risk in light of recent empirical evidence that a commitment to conventionalism is a significant characteristic of the police personality.

The ordinance's vagueness further licenses judges and juries to convict for unconventional behavior in violation of *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

C. *Ordinance's vagueness as permitting application to constitutionally protected conduct.* The ordinance threatens the privilege against self-incrimination, freedom of movement, freedom from arrest except upon "probable cause", and freedom from conviction except upon proof beyond a reasonable doubt, as is developed in the remainder of the brief.

II.

The privilege against self-incrimination prohibits government from using compulsion to elicit incriminating admissions, *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), from penalizing the invocation of the privilege, *Spevack v. Klein*, 385 U.S. 511 (1967), and from

using in any criminal prosecution statements made under threat of sanction for refusal to answer. *Garrity v. New Jersey*, 385 U.S. 493 (1967). These principles establish beyond peradventure that the police have no right to compel answers to their incriminating questions. *Davis v. Mississippi*, 394 U.S. 721, 727 n. 6 (1969). Yet, the City of Euclid has enacted an ordinance that purports to give them that right.

The ordinance must be declared unconstitutional on its face because it violates the central meaning of the privilege against self-incrimination and the privilege cannot adequately be protected from it on a case by case basis because of the paucity of appellate review due to the ignoble socio-economic status of most defendants, the relatively minor penalties compared to the costs of appeal, mootness by service of sentence, and the absence of a written record.

As applied in this case the ordinance produced a conviction which cannot stand because it is predicated in part upon statements elicited from Palmer under compulsion to "give a satisfactory account". *Garrity v. New Jersey*, 385 U.S. 493 (1967).

III.

"Freedom of movement is basic in our scheme of values", *Kent v. Dulles*, 357 U.S. 116, 126 (1958), but it is not absolute. The delicate balance between liberty of movement and the requirements of order is drawn by the Constitution and reflected in an escalating scale of burdens of proof, emanating from the Fourth and Fourteenth Amendments, required of government before it may deprive persons of that freedom. A brief, on-the-street detention requires "articulable suspicion"; an arrest demands "probable cause"; and imprisonment pursuant to conviction requires "proof beyond a reasonable doubt". The Euclid suspicious persons ordinance makes hash out of this delicate constitutional balance by authorizing all levels of deprivation on mere suspicion.

The Euclid suspicious persons ordinance is not necessary to law enforcement because of this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968) and the availability of feasible alternative means of dealing with suspicious circumstances and persons, such as the *Uniform Arrest Act*, the *New York "Stop and Frisk" Act*, the *Model Code of Pre-Arraignment Procedure*, and the common law powers recognized in *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E. 2d 114 (1966), all of which are less stifling of fundamental personal liberties. The alternatives do not permit arrests or convictions on mere suspicion; do not make it a crime to exercise the privilege against self-incrimination, and do not shift the burden of proof to the defendant. This Court can make a significant contribution to constitutional liberty at no cost to law enforcement by striking down the Euclid suspicious persons ordinance.

ARGUMENT

I.

THE EUCLID SUSPICIOUS PERSONS ORDINANCE IS SO VAGUE AND LACKING IN ASCERTAINABLE STANDARDS OF GUILT THAT IT FAILS TO GIVE FAIR NOTICE OF WHAT IS PROHIBITED, INVITES ARBITRARY AND DISCRIMINATORY ENFORCEMENT AND SWEEPS WITHIN ITS AMBIT CONSTITUTIONALLY PROTECTED CONDUCT, SO AS TO VIOLATE THE GUARANTEE OF DUE PROCESS OF LAW.

This Court has long held that "the first essential of due process of law" is violated by "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

The requirement that criminal statutes be drawn with clarity and precision so as to provide an ascertainable stand-

ard of guilt is founded upon three separate, but related policies: to provide fair notice of what conduct is prohibited, so that those who wish to conform their conduct to law may do so, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); to prevent arbitrary and discriminatory enforcement of the law by reducing the scope of discretion of those administering it, *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); and to limit the breadth of statutes affecting constitutionally protected freedoms in order to prevent their infringement by "sweeping and improper" statutory application. *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963); *Aptheker v. Secretary of State*, 378 U.S. 500, 516-517 (1964).[1]

The suspicious persons ordinance under which James Palmer was convicted and sentenced to thirty days imprisonment is patently vague and blatantly at odds with each of the constitutional policies which underlie the void-for-vagueness doctrine.

A. The Ordinance Is So Vague That It Fails To Give Fair Notice Of What Is Prohibited.

Many statutes have been invalidated by this Court for failing to provide fair notice on the basis of the vagueness of a single word or phrase.[2] The Euclid suspicious persons

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[1] This tripartite analysis of the void-for-vagueness doctrine was fully developed by Professor Amsterdam in *Note, The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960), and applied to vagrancy and suspicious person type laws in Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205 (1967).

[2] See, e.g., *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) ("a reasonable profit"); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926) ("current rate of . . . wages in the locality"); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) ("unjust or unreasonable rate").

ordinance is rendered incomprehensible as a guide for the governance of conduct, by the fact that virtually its every phrase is afflicted with the vice of vagueness. No ascertainable standard of conduct is provided by "wanders", "found abroad at late or unusual hours in the night", "without any visible or lawful business", "does not give satisfactory account of himself", or "suspicious persons".

(1) *"Wanders"*

Webster's Unabridged Dictionary (2d ed. 1962) defines "wander" as: "to ramble here and there, without any certain course[3] or object in view; to travel or move from place to place without any fixed purpose or destination . . ."

The ambiguities inherent in these lay definitions of "wander" are reflected by the many and conflicting interpretations accorded the word by judges who have had occasion to construe it. In *City of Columbus v. DeLong*, 173 Ohio St. 81, 180 N.E. 2d 158 (1962), a majority of the Ohio Supreme Court held that since "wander" is commonly defined as moving about "without a fixed course, aim or goal", the word necessarily excludes having a criminal purpose, and thus the ordinance in question was invalidated as prohibiting *only innocent conduct*. On the other hand, Judge Taft in dissent would have upheld the ordinance, contending that in the context of the ordinance "wander" encompassed *only criminal conduct*, requiring proof of intent to solicit for prostitution. A third distinct interpretation of "wander" was rendered in *City of Seattle v. Drew*, 70 Wash. 2d 405, 423 P.2d 522 (1967), in which the court construed the word to include *both innocent and culpable conduct*, and therefore struck down the ordinance in question as overly broad. The Seattle Ordinance was not saved by the presence of the equally imprecise, but more pejora-

[3]This much of the definition is identical to that contained in *Black's Law Dictionary* (4th ed. 1957).

tive, word "loiter". Similarly the United States Court of Appeals for the District of Columbia held that neither "wander" nor "loiter" was sufficiently precise to withstand constitutional scrutiny, citing conflicting judicial[4] and police interpretations[5] "ranging from the ostensibly innocent to the potentially criminal". *Ricks v. District of Columbia*, 414 F.2d 1097, 1103, 1107 (D.C. Cir. 1968).

A host of other lower federal and state courts have recently struck down vagrancy or suspicious persons laws proscribing "wandering" and/or "loitering" as too vague to fairly apprise persons of what conduct is prohibited.[6]

(2) *"Found abroad at late or unusual hours in the night without any visible or lawful business."*

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[4]Contrasting *Kelley v. United States*, 111 U.S. App. D.C. 396, 397, 298 F.2d 310, 311 (1961) with *Harris v. District of Columbia*, 132 A.2d 152, 154 (D.C. Mun. App. 1957), rev'd on other grounds 102 U.S. App. D.C. 202, 251 F.2d 913 (1958).

[5]The court summarized the police testimony in *Ricks* as follows:

> "One police officer considered loitering to consist in 'walking back and forth from the corner and standing idle in a doorway'. Another felt that it was 'standing around in one spot, not going anywhere. Just standing there flagging automobiles'. Still another said it was '[s]tanding idle in a doorway'. The Chief of the Law Enforcement Division of the Corporation Counsel's office defined loitering as 'a man hanging around a street corner he has been hanging around for an hour, we will say, there is no apparent purpose or motive for his being there. But, now loitering in and of itself doesn't make me a vagrant. * * * You have got to have some acts on his part to indicate that he has an ulterior motive'." *Ricks v. District of Columbia*, 414 F.2d 1097, 1103, n. 41 (D.C. Cir. 1968).

[6]See, e.g., *Scott v. District Attorney, Jefferson Parish, State of Louisiana*, 309 F. Supp. 833 (E.D. La. 1970); *Landry v. Daley*, 280 F. Supp. 968 (N.D. Ill. 1968); *Arnold v. City and County of Denver*, ___ Colo. ___, 464 P.2d 515 (1970), overruling *Dominguez v. City and County of Denver*, 147 Colo. 233, 363 P.2d 661 (1961); *Headley v. Selkowitz*, 171 So. 2d 368 (Fla. 1965).

This phrase is simply a nocturnal version of "wandering" or "loitering" and is subject to the same vagaries of interpretation that render those verbs insufficient as standards of conduct. Being "abroad . . . without any visible or lawful business" could mean "to ramble here and there, without any certain course or object in view" (as in the dictionary definition of "wander"),[7] in which case the proscription would embrace the law professor who walks the streets midnight.[8] On the other hand the phrase could be construed to prohibit only being abroad for an unlawful or criminal purpose.[9]

The problem is that the statutory language provides no basis for selection among these alternatives. As one district court put it:

> "nor does the phrase 'without lawful business' do more than beg the question of when loitering or loafing [or wandering] can themselves amount to 'lawful business'." *Scott v. District Attorney, Jefferson Parish, State of Louisiana,* 309 F. Supp. 833, 837 (E.D. La. 1970).

(3) *"Does not give satisfactory account of himself"*

Whether this clause be regarded as an element of the offense, or as an opportunity for potential defendants to exculpate themselves,[10] it is so incredibly vague and subjective

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[7]See footnote 3, *supra.*

[8]Reich, *Police Questioning of Law Abiding Citizens,* 75 YALE L. J. 1161 (1966).

[9]*City of Portland v. Goodwin,* 187 Ore. 409, 429, 210 P.2d 577, 586 (1949).

[10]The latter notion is the product of some incredible constructional gymnastics engaged in by some courts in an effort to save statutes containing "satisfactory account" clauses from obvious conflict with the privilege against self-incrimination. See, e.g. *People v. Merolla,* 9 N.Y. 2d 62, 172 N.E. 2d 541 (1961).

as to contaminate virtually any statute or ordinance that includes it.

A virtually infinite number of unanswered questions could be propounded as to the meaning of "satisfactory account". Just a few of them were raised by a three-judge district court in striking down a loitering ordinance which embodied the requirement:

> "We do not believe that the requirement that an offender 'give a satisfactory account of himself' passes constitutional tests. It places sole determination in the discretion of the policeman on the beat. The standard of 'satisfactory account' is not certain, for what may be satisfactory to one may be unsatisfactory to another, and the meaning of the word 'satisfactory' itself is not susceptible of any standard of exactness. What kind of 'satisfactory'? Legal or moral satisfaction? What is the time limit to be embraced within the giving of 'a satisfactory account' that will excuse the offender in the sole discretion of the police officer who demands it? A satisfactory account at that instant or a satisfactory account of past activity? If of past activity, is that not guilt without proof? Does the mere fact that one cannot give a satisfactory account of himself to the pleasure of the inquiring officer make him guilty of an unspecified crime?" *Baker v. Bindner*, 274 F. Supp. 658 (W.D. Ky. 1967).

Equally unanswered is how much of an explanation is needed to add up to an "account", who is entitled to demand an account, whether an account which is incredible but truthful is "satisfactory"; and, conversely, whether a credible but false account "satisfies" the requirement. Considerations such as these have led at least nine lower fede-

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Nevertheless, such a construction cannot operate to save the ordinance from a vagueness attack as even exculpatory clauses are held to the standard of clarity. *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927).

ral and state courts in the last five years to strike down vagrancy or suspicious persons laws containing a "satisfactory account" or comparable requirement.[11]

(4) *"Suspicious person"*

Nor is this otherwise vague ordinance given any finite content by its characterization of offenders as "suspicious persons". This phrase is little more than an epithet and furnishes no guidance to potential offenders as to what they must do or not do to avoid criminal liability under its appellation.

In sum, while each of the aforementioned ingredients of the Euclid suspicious persons ordinance is sufficiently vague to render it of dubious constitutionality, the hash that results from their combination is so incomprehensible that its invalidity should be beyond question. The ordinance fits Mr. Justice Frankfurter's description of the statute invalidated in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) as

> "of the type that seek to control 'vagrancy'. These statutes are in a class by themselves in view of the familiar abuses to which they are put . . . Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of the police and prosecution, although not chargeable with any

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[11] See *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968) ("good account"); *Scott v. District Attorney, Jefferson Parish, State of Louisiana*, 309 F. Supp. 833 (1970) ("account for lawful presence"); *Landry v. Daley*, 280 F. Supp. 968 (N.D. Ill. 1968) ("reasonable excuse"); *Baker v. Bindner*, 274 F. Supp. 658 (3 judge court W.D. Ky. 1967); *United States v. Margeson*, 259 F. Supp. 256 (E.D. Pa. 1966) ("good account"); *Arnold v. City and County of Denver*, ___ Colo. ___, 464 P.2d 515 (1970), overruling *Dominguez v. City and County of Denver*, 147 Colo. 233, 363 P.2d 661 (1961); *Headley v. Selkowitz*, 171 So. 2d 368 (Fla. 1965); *Alegata v. Commonwealth*, 353 Mass. 287, 231 N.E. 2d 201 (1967); *City of Seattle v. Drew*, 70 Wash. 2d 405, 423 P.2d 522 (1967).

particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statutes or by the subject matter so as to give notice of conduct to be avoided." *Winters v. New York*, 333 U.S. 507, 540 (1948) (dissenting opinion).

B. The Vagueness Of The Ordinance Invites Arbitrary And Discriminatory Enforcement.

A second reason for the invalidation of vague penal statutes is that they vest discretion unfettered by statutory standards in law enforcement officials, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), and courts and juries, *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), thereby facilitating arbitrary and discriminatory enforcement and conviction.

No elaborate reasoning is required to demonstrate that the Euclid suspicious persons ordinance suffers from this vice, for not only is it abundant with vagueness, but it also expressly devises unfettered discretion to the police to subjectively determine culpability by any or no criterion, pursuant to the "satisfactory account" requirement. Accordingly the ordinance stands condemned under this Court's decision in *Shuttlesworth v. City of Birmingham, supra*, at 90-91, where it said:

> "Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.' *Cox v. State of Louisiana*, 379 U.S. 536, 559, 579 (separate opinion of MR. JUSTICE BLACK)."

In addition, the vagueness of such phrases as "wander", "abroad", "without any visible or lawful business", and "suspicious person" permit the police to employ illegiti-

mate bases for selecting subjects from whom "satisfactory accounts" are demanded. In the instant case, Euclid police officer Zupanic testified (with commendable candor) that James Palmer became "a suspicious person" in part because "a colored female" alighted from his car (A. 5) when he knew no colored females lived in the apartment complex (A. 7, 20, 21).[12]

While American race relations have undergone enormous changes since 1944, when Gunnar Myrdal reported general and pervasive racial discrimination in law enforcement,[13] there is reason to believe that race is still a significant factor in police street patrol and suspicious person practices. Latest available arrest statistics reveal that Negroes are disproportionately arrested for "suspicion" (arrests for no specific offense and released without formal charges being placed), accounting for 45.3 per cent of such arrests, compared to only 27.5 per cent of total arrests.[14] These gross statistics are corroborated by recent studies of police behavior,[15] and illustrated by anecdotal reports of detentions

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[12] Of possible significance was Zupanic's gratuitous insertion of Palmer's race—"Colored"—on the affidavit line marked "Sex", when the form called for no racial classification. (A. 3).

[13] ". . . Negroes are more likely to be arrested than whites, more likely to be indicted after arrest, more likely to be convicted in court and punished. Negroes will be arrested on the slightest suspicion, or on no suspicion at all, merely to provide witnesses or to work during a labor shortage in violation of anti-peonage laws. The popular belief that all Negroes are inherently criminal operates to increase arrests, and the Negro's lack of political power prevents a white policeman from worrying about how many Negro arrests he makes." Myrdal, *An American Dilemma*, 968 (1st ed. 1944).

[14] F.B.I., *Uniform Crime Reports* - 1968, Table 30, p. 120.

[15] See, e.g. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police*, at 184 (1967) reporting a survey based on riding with patrol units in two cities which disclosed that members of minority groups were often stopped, particularly if found in groups, in the company of white

and arrests of responsible, law-abiding Negroes.[16] Indeed, this Court took note of such practices in its decision in *Terry v. Ohio*, 392 U.S. 1, 13 (1968).[17]

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people, or at night in white neighborhoods, and that this caused serious problems in police-community relations; and Tiffany, McIntyre, and Rotenberg, *Detection of Crime*, at 20 (1967):

> "A person of one race observed in an area which is largely inhabited by a different racial group may be stopped and questioned. A Negro in an area which is almost exclusively white is more suspect than a white in the same area, although a decision to stop for questioning may not be made on that basis alone. A white person in a Negro neighborhood late at night is very likely to be detained. But in the latter case the purpose of the detention is not usually to detect crime but to warn the person of the danger of being in the area particularly if he is alone."

[16]See, e.g., Judge Theodore Souris' report of an eminent Negro jurist who was stopped while driving home at night after visiting his fiancee in a fashionable residential neighborhood. At the police officer's request, he handed over his driver's license and automobile registration and informed the officer that he had been visiting a friend in the neighborhood. But he refused to identify his fiancee and was thereupon taken to police headquarters where he was immediately recognized and released with appropriate apologies. Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L. C. & P. S. 251, 252-253 (1966).

The facts of this incident bear striking similarity to some of those in the instant case, particularly the judge's refusal to divulge the identity of his female friend (A. 7). Perhaps, if James Palmer were a judge, he would not now be under sentence of thirty days imprisonment.

For testimony that this story is not a unique one, see American Law Institute, *1966 Proceedings*, at 105, where Judge George Edwards, relating his experience as Police Commissioner of Detroit, stated,

> "I don't think I know a single Negro lawyer, businessman, or doctor who has talked to me about this topic who has not told of his [personal] experience with stop and frisk."

[17]The Court concluded that the application of the exclusionary rule to the product of legitimate police investigations would not effectively deter the practices complained of. Of course, the issue in the instant case is not the exclusionary rule, but rather the subject of

It might be contended that race is a neutral, rational and noninvidious basis for determining who is not a resident of the patrolled neighborhood and is therefore the proper subject of investigation. However, this claim must be evaluated in the light of the history of racial discrimination and segregation that facilitates it and of "the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States". *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

A majority of this Court has taken the position that racial classifications in the exercise of state police power

> "bear a heavy burden of justification . . . and will be upheld only if necessary, and not merely rationally related to the accomplishment of a permissible state policy." *Id.*, at 194.[18]

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an investigation which discloses no evidence of crime may be imprisoned for having generated suspicion.

[18] Articulating its reasons for imposing this heavy burden of justification, the majority opinion declared,

> "We deal here with a racial classification embodied in a criminal statute. In this context, where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause which, as reflected in congressional enactments dating from 1870, were intended to secure 'the full and equal benefit of all laws and proceedings for the security of persons and property' and to subject all persons to 'like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' R.S. § 1977, 42 U.S.C. § 1981 (1958 ed.)."

Two members have stated that

> "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." *McLaughlin v. Florida*, *supra*, at 198. (Separate opinion of MR. JUSTICE STEWART and MR. JUSTICE DOUGLAS).

Although the Euclid suspicious persons ordinance contains no express racial elements, its vagueness facilitates enforcement on a racial basis as surely as if embodied in the language of the ordinance itself.

The contention that race furnishes a neutral basis for inquiry requires a threshold showing that white persons found in black neighborhoods are subject to the same treatment as black persons found in white neighborhoods. The available evidence on this question falls far short of the "heavy burden of justification" required, and in fact may even point to the contrary conclusion.[19]

Secondly, the need to discuss this issue in terms of black neighborhoods and white neighborhoods constitutes a tragic reminder of the long history of housing discrimination and segregation, both governmental[20] and private,[21] that facilitates the use of race as a sign of being out of place. In the instant case, Officer Zupanic could testify that no colored females lived in an apartment complex (A. 7) large enough to have 2,000 cars parked on the premises (A. 12). This is not surprising in the City of Euclid, a municipality for which the census reported only 105 nonwhite residents out

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[19] See Tiffany, et al., *Detection of Crime, supra,* at fn. 15, indicating that detentions of whites in black neighborhoods are generally for the purpose of warning them of the danger of being in the area.

[20] See *Buchanan v. Warley,* 245 U.S. 60 (1917).

[21] See *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 441-442 (1968):

> "Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."

See also: *Shelley v. Kraemer,* 334 U.S. 1 (1948); and Title VIII (Fair Housing), *Civil Rights Act of 1968,* 82 Stat. 73, 42 U.S.C. § 3601-3619.

of a total population of 62,998.[22] Government should not be permitted to avail itself of the product of this long history of racial discrimination, even for an otherwise legitimate legislative purpose.[23]

Finally, even if applied in an ostensibly neutral and even-handed manner, the racial test for selecting subjects of detention and investigation necessarily produces a differential impact on the freedom of movement of the minority race, as there are necessarily more areas in which its members will be "out of place".[24]

The capacity of the Euclid suspicious persons ordinance for arbitrary enforcement is not limited to racial discrimination, but also includes the potential for suppressing non-criminal but unconventional persons and behavior. Relevant to this concern is the observation of recent students of police behavior that an essential characteristic of the patrol-

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[22]U.S. Bureau of Census, *Census of Pop. 1960*, Vol. I, p. 37-266, Table 72.

That this paucity of nonwhite residents is not a representative distribution of the area's population is demonstrated by the fact that the same census reported 258,597 nonwhite residents in the county (Cuyahoga) out of a total population of 1,647,895. U.S. Bureau of Census, *Census of Pop. 1960*, Final Report P.H.C. (1)-28, Census Tract Cleveland, Ohio, Table p. 1, p. 14.

Housing discrimination is not a phenomenon unknown to the State of Ohio. See *Hunter v. Erickson*, 393 U.S. 385 (1969); and the Ohio Fair Housing Act, Section 4112.02(H), Ohio Rev. Code.

[23]Cf. *Gaston County, North Carolina v. United States*, 395 U.S. 285 (1969).

[24]Professor Amsterdam points out that

> "[t]he right to travel—freedom of movement—has excellent Fourteenth Amendment credentials in light of the concern of the Reconstruction Congresses with the 'pass system' enforced by the Southern States upon the Freedmen after the Civil War". Amsterdam, footnote 1, *supra*, 3 CRIM. L. BULL. 205, at 213, n. 2.

man's personality is a commitment to conventionalism.[25] Equally relevant are police instructional manuals equating "suspicious" with "unusual".[26] While this may be sound advice for investigatory purposes, and may even provide a legitimate basis for a "stop and frisk", *Terry v. Ohio*, 392 U.S. 1 (1968), it is constitutionally outrageous as a basis for conviction and imprisonment.[27] Yet the vagueness of the

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See *Id.*, at 230-231, n. 22 for authorities demonstrating the 39th Congress' concern that post-Civil War Southern vagrancy laws, although facially color blind, were being discriminatorily enforced against the Freedmen.

[25] Whether this be ascribed to an "authoritarian personality" as in Niederhoffer, *Behind the Shield–The Police in Urban Society*, 108 (1967), or to the element of danger producing a perceptual shorthand that equates the unusual with the violent as in Skolnik, *Justice Without Trial*, 44-48 (1965), the result is the same.

[26] See, e.g., Gilston and Podell, *The Practical Patrolman*, 43 (1959):

> "What makes a 'suspicious' person, action or circumstance? In part it's a matter of not 'belonging'; of being unusual. A person in dirty, ragged clothes may be unusual in one neighborhood, but in another he sticks out like a sore thumb";

And Adams, "Field Interrogation", *Police*, March-April, 28 (1963):

> "A. Be suspicious. This is a healthy police attitude, but it should be controlled and not too obvious.
>
> B. Look for the unusual.
>
> 1. Persons who do not 'belong' where they are observed.
>
> 2. Automobiles which do not 'look right'.
>
> 3. Businesses open at odd hours, or not according to routine or custom."

[27] For a cogent distinction between the use of "suspicious person" type criteria as bases for authorizing threshold inquiry and their use as grounds for conviction (as in the instant case) compare *Commonwealth v. Lehan*, 347 Mass. 197, 196 N.W. 2d 840 (1964) with *Alegata v. Commonwealth*, 353 Mass 287, 231 N.E. 2d 201 (1967). See also *City of Cleveland v. Forrest*, 10 Ohio Misc. 98, 100, 223 N.E. 2d 661, 663 (Mun. Ct. 1967).

Euclid suspicious persons ordinance licenses judge or jury to punish defendants for behavior that is unconventional[28] or, as in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), "reprehensible".

C. The Vagueness Of The Ordinance Permits Its Application So As To Punish And Deter Constitutionally Protected Conduct.

The Euclid suspicious persons ordinance either flagrantly violates or implicitly threatens the privilege against self-incrimination, the right to travel, freedom from arrest except upon "probable cause", freedom from conviction except upon proof "beyond a reasonable doubt", and the right not to be punished for the status of being "a suspicious person". The sources of these constitutional liberties and the manner in which the Euclid ordinance threatens them will be developed in the succeeding sections of this brief.

II.

THE PROVISION COMPELLING A SUSPECT TO "GIVE A SATISFACTORY ACCOUNT OF HIMSELF" UNDER PAIN OF FINE AND/OR IMPRISONMENT VIOLATES THE PRIVILEGE AGAINST SELF-INCRIMINATION AND INVALIDATES THE EUCLID SUSPICIOUS PERSONS ORDINANCE ON ITS FACE AND AS APPLIED.

Much of the recent controversy over the scope of the Fifth Amendment privilege against self-incrimination has involved the issue of when and where the privilege is applica-

[28] Note the claim by the City of Euclid in its *Brief Opposing Jurisdiction* of the right to regulate "irregular behavior". *Id.*, at 4.

ble. While there is disagreement over whether particular contexts involve sufficient risk of compulsion to trigger the application of the privilege, *Miranda v. Arizona*, 384 U.S. 436 (1966), there is consensus that government may not use compulsion to elicit incriminating admissions, in or out of the courtroom. *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965). Thus, the contention that the privilege "does not apply to police interrogations" has not been predicated upon formalistic distinctions between courtroom and police station, but upon a recognition that

> "[s]ince police have no legal right to compel answers, there is no legal obligation to which a privilege in the technical sense can apply. That is, it makes no sense to say that one is privileged not to disclose—that one is excused from the legal consequences of contumacy—when there are no legal consequences of contumacy." 8 Wigmore, *Evidence* § 2252, at 329 n. 27 (McNaughton rev. 1961).

Any contention that language in the *Miranda* opinion permits vesting police with authority to compel answers during "general on-the-scene questioning" is foreclosed by this Court's subsequent explanation of that language in *Davis v. Mississippi*, 394 U.S. 721, at 727 n. 6 (1969):

> "The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime. See *Miranda v. Arizona*, 384 U.S. 436, 477-478 (1966); *Culombe v. Connecticut*, 367 U.S. 568, 635 (concurring opinion) (1961). But these statements merely reiterated *the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.*" (emphasis added).[29]

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[29] See also the separate opinion of MR. JUSTICE WHITE in *Terry v. Ohio*, 392 U.S. 1, at 34 (1968):

> "Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes

The privilege against self-incrimination means that government may not "resort to imprisonment" to compel an individual to answer questions that might incriminate him, *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), may not require him to supply information that may tend to incriminate him, *Marchetti v. United States*, 390 U.S. 39 (1968); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); may not penalize the invocation of the privilege, *Spevack v. Klein*, 385 U.S. 511 (1967); *Griffin v. California*, 380 U.S. 609 (1965), and may not use in any criminal prosecution statements made under threat of sanction for refusal to answer. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

That these principles and authorities prohibit a municipality from making it a crime to refuse to answer a policeman's incriminating questions is recognized in the law review literature by friend[30] and foe[31] alike of expanding police investigatory powers.[32] Yet this is exactly what the

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no basis for an arrest, although it may alert the officer to the need for continued observation."

[30] Kuh, *The "Rest of Us" in the "Policing the Police" Controversy*, 57 J. CRIM. L. C. & P. S. 244, 248 (1966); La Fave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39, 106-107 (1968); Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L. C. & P. S. 465, 474 (1967).

See also Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320 (1942).

[31] Amsterdam, footnote 1, *supra*, 3 CRIM. L. BULL. 205, 228 (1967); Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police*, 58 J. CRIM. L. C. & P. S. 433, 459 (1967); Note, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 788-790 (1968).

[32] A similar conclusion has been reached by the American Law Institute. A.L.I., *Model Code of Pre-Arraignment Procedure*, Tent. Drft. No. 2, §§ 2.01(2), 2.02(5).

City of Euclid has done in enacting a suspicious persons ordinance compelling suspects to "give a satisfactory account" of themselves under pain of fine and/or imprisonment for failure to do so.

The "satisfactory account" requirement necessarily puts suspects of whom it is demanded to a choice between the "rock" of prosecution for being a suspicious person and the "whirlpool" of potential self-incrimination. Such a requirement is no mere technical or peripheral violation of the Fifth Amendment, but strikes at the heart of

> "the whole complex of values that the privilege against self-incrimination itself represents, values described in the *Malloy* case as reflecting 'recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. * * * Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Tehan v. Shott*, 382 U.S. 406, 414 (1966).

The privilege against self-incrimination was molded in the cauldron of the Star Chamber where suspects were compelled to respond to incriminating inquiries and to bear the burden of proving their innocence. The abolition of the Star Chamber[33] in the wake of Lilburn's Trial[34] is generally

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This represents an interesting change of position by the Institute since 1961 when it approved the Suspicious Loitering section of the *Model Penal Code* (§ 250.6) requiring suspects to explain their presence and conduct, despite the fact that the Code's Reporter stated, "We are creating a criminal liability by a man refusing to speak. This is an incursion on the privilege of self incrimination." ALI, 1961 Proceedings 249.

No explanation is given in the notes or commentary to the *Model Code of Pre Arraignment Procedure* for this apparent contradiction.

[33] Stat. 16 Charles 1 C. 10 (1641).

[34] 3 How. St. Tr. 1315 (1637-45).

regarded as the foundation of the privilege and the core of its interpretation.[35]

The central meaning of the privilege against self-incrimination requires that Section 583.01(e) of the Ordinances of the City of Euclid be declared unconstitutional on its face for the following reasons: (1) In creating a scheme which gives police the power to summon citizens upon mere suspicion and "demand that they cough up something to dispel [that] suspicision",[36] the essence of the ordinance is a reincarnation of the evil the privilege was designed to eliminate. (2) By definition the law compels a "satisfactory account" only from those "inherently suspect of criminal activities".[37] (3) A declaration of facial unconstitutionality is the only way that the privilege can be vouchsafed from the threat posed by such laws, in light of the fact that the ignoble socio-economic status of most of their victims and their relatively minor penalties effectively foreclose appellate scrutiny[38] of their operation on a case by case basis.[39]

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[35] 8 Wigmore, *Evidence* § 2250 (McNaughton rev. 1961).

[36] Amsterdam, footnote 1, *supra*, 3 CRIM. L. BULL. 205, 228 (1967).

[37] *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965).

[38] President's Commission on Law Enforcement, *Task Force Report: The Courts* 103 (1967).

Other factors that tend to make appeals of such convictions a rarity are the frequent absence of a written record and mootness by service of sentence.

For a description of the kind of "due process" that is administered under circumstances where appellate review is not a realistic recourse, see Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, *passim* (1956). To summarize Professor Foote's field study in his own words: "Procedural due process does not penetrate to the world inhabited by the 'bums' of Philadelphia." Id., at 604.

[39] As to the possibility of other remedies, such as affirmative suits for damages, to vindicate the privilege, note Euclid Police Lieutenant Zach's testimony about "waiver cards":

As applied in the instant case, the ordinance produced a conviction which cannot stand, for much of the case against Palmer consisted of statements elicited from him under the compulsion of the requirement that he give "a satisfactory account".[40] (A. 6-7, 22-23). The admission into evidence of statements so obtained is prohibited by the Fifth and Fourteenth Amendments. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

After testifying that if he had found Palmer's companion in an apartment on lawful business, he wouldn't have permitted the citation, he said (in response to Palmer's questioning),

"A. We would have brought you into the station and had you sign a waiver card that we detained you?

Q. What is this waiver card? If I would refuse to sign the waiver card, then what would have happened to me?

A. Well, then, we would have detained you, probably issued the citation, because you refused to sign the card.

Q. You would have issued a citation for my arrest even though you found this lady lawfully at the building; is that what you're saying?

A. That is right. If you refused to sign the card. (A. 24)."

[40]The existence of the "satisfactory account" requirement in the ordinance obviates the necessity of deciding the otherwise important, but in this context irrelevant, question of whether the requirement of *Miranda* warnings applies to street detentions, i.e. whether the officer's removal of Palmer from his car and search of him (A. 7), marching of Palmer into the apartment house at gun-point (A. 8, 12-13), or holder for investigation at the station (A. 6-7) constituted deprivations of "his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436,444 (1966).

With the ordinance on the books, the officer could not have advised Palmer that he had a right to remain silent. He would have had to say, "If you [do] say anything, it will be used against you; if you do not say anything, that will be used against you." *McCarthy v. United States*, 25 F.2d 298, 299 (6th Cir. 1928).

III.

THE EUCLID SUSPICIOUS PERSONS ORDINANCE UNCONSTITUTIONALLY INFRINGES FREEDOM OF MOVEMENT BY ALLOWING ARREST, DETENTION, AND CONVICTION ON SUSPICION IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

"Freedom of movement is basic in our scheme of values" and may not be deprived without due process of law. *Kent v. Dulles*, 357 U.S. 116, 126 (1958).[41] As the Court noted:

> "'Our nation has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.'" *Id.*, quoting Chafee, *Three Human Rights in the Constitution of 1787*, 197 (1956).

Of course this freedom is not absolute and must be reconciled with the interest of maintaining order. The task of accommodating the often opposing interests in liberty and order was undertaken by the framers of the Constitution and Bill of Rights. The resultant delicate balance is reflected in an escalating scale of constitutional burdens of proof (emanating from the Fourth and Fourteenth Amendments) required of government before it may deprive persons of their liberty in the interest of order.

The quantum of evidence required by each of these constitutional burdens of proof is directly related to the magnitude of the deprivation of liberty to be justified. Thus a brief, temporary intrusion on the liberty of a citizen by a police officer in the course of a "street encounter" requires that the officer

> "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

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[41] Regarding the concern of the framers of the Fourteenth Amendment for the right of the freedman "to go where he pleases" see *Bell v. Maryland*, 378 U.S. 226, 293 (1964); and footnote 24, *supra*.

The more serious deprivation of liberty represented by an arrest demands that the arresting officer have "probable cause", defined as

> "facts and circumstances within [his] knowledge and of which [he] had reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

The ultimate deprivation of liberty that ensues from the conviction of an accused may not be levied

> "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, ___ U.S. ___, 90 S. Ct. 1068 (1970).

It has been abundantly demonstrated that suspicious person and vagrancy type laws are calculated to circumvent these constitutional standards and facilitate detention, arrest, search, interrogation and conviction of suspected criminals with respect to whom the authorities do not have the requisite quantum of evidence.[42] By making the generation of suspicion itself the substantive offense, such "laws" make hash out of the delicate balance which the Constitution seeks to establish between the societal interests in liberty and order.

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[42] President's Commission . . ., *Task Force Report: The Courts* 103 (1967); Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L. J. 1 (1960); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 628-630 (1956); La Fave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 TEXAS L. REV. 434, 451-452 (1967).

An interesting illustration of this phenomenon was *People v. Craig*, 152 Cal. 42, 91 P. 997 (1907) where a police officer who lacked statutory grounds to arrest for an assault said; "Well the only thing we can do—we didn't see it—we will go and vag them."

Thus, on facts which should justify at most a "stop and frisk" of James Palmer,[43] the City of Euclid now seeks to uphold a conviction and sentence of imprisonment. While the advocates of allowing police to "stop and frisk" upon less than "probable cause" have relied on the argument that a lesser intrusion requires a lesser quantum of evidence,[44] if this ordinance is upheld then "stop and frisk" facts will henceforth be the basis for arrest and conviction. The operative standards of justification will be reduced to "'articulable suspicion' to suspect" for a stop and frisk, "'probable cause' to suspect" for an arrest, and "proof of suspicion 'beyond a reasonable doubt'" to convict.

The salt in these grievous constitutional wounds will be that, by operation of the "satisfactory account" requirement, the effective burden of proof will be on the defendant.

IV.

THERE IS NO NECESSITY FOR THE EUCLID SUSPICIOUS PERSONS ORDINANCE, AND TO THE EXTENT THAT IT SERVES LEGITIMATE PURPOSES, OTHER MEANS LESS DESTRUCTIVE OF PERSONAL LIBERTY, ARE AVAILABLE.

One well-established principle by which this Court tests the constitutionality of statutes affecting sensitive areas of liberty is that

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental per-

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[43] Because the question in this case is whether or not Palmer's conviction for "being a suspicious" person may stand, it is unnecessary to decide whether "being a suspicious person" justified the lesser intrusion of the "stop and frisk" (A. 7) under *Terry*, or the "arrest" (A. 7-8) under *Beck v. Ohio*, *supra*, and *Peters v. New York*, 392 U.S. 40 (1968).

[44] *Terry v. Ohio*, 392 U.S. 1, 10-11 (1968).

> sonal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964), quoting from *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

If there ever was a necessity for suspicious persons ordinances (i.e. that the Fourth Amendment talismans of "arrest", "search" and "seizure" did not allow for the "set of flexible responses" required of police in the context of street encounters) that necessity has been dissipated by this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968). Without prescribing the details,[45] the Court has held that the Fourth Amendment is not oblivious to the "reasonable" investigatory and protective needs of police.

In the wake of *Terry*, there are a number of feasible alternatives to the Euclid suspicious persons ordinance for effectuating police authority to prevent crime and investigate suspicious circumstances and persons. Without, in any way, approving of them as passing constitutional muster, appellant submits these alternatives for the Court's consideration, because they are, at least, less destructive of important federal constitutional rights than the Euclid ordinance. These alternatives are:

> *The Uniform Arrest Act*, see Warner, 28 VA. L. REV. 315 (1942)
>
> *The New York "Stop and Frisk" Law*, N.Y. Code Crim. Proc. § 180-a
>
> *The Model Code of Pre-Arraignment Procedure*, Article 2 (T.D. No. 2), American Law Institute.
>
> Common law authority recognized by the Cuyahoga County Court of Appeals in *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E. 2d 114 (1966).

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[45] For a thorough exposition of the issues raised by *Terry* see La Fave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39 (1968).

Additionally, the *Model Penal Code's* Article 5 approach to inchoate offenses furnishes a vehicle for crime prevention by drawing the line between attempt and non-criminal preparation further away from the final act.

The common features of all of these alternatives are that they do not permit arrests or convictions on mere suspicion, they do not make it a crime to exercise the privilege against self-incrimination, and they do not shift the burden of proof to the defendant, while still affording ample police authority.

All sides of the crime control versus individual liberty debate, from Professor Foote in 1956[46] to the President's Commission on Law Enforcement and Administration of Justice in 1967[47] to Professor La Fave in 1968[48] have urged that the subterfuges of vague suspicious person and vagrancy laws be abandoned in favor of a direct resolution of the question of police power to deal with persons encountered in suspicious circumstances.

The existence of equally feasible less drastic alternatives means that this Court can make a significant contribution to constitutional liberty at no cost to law enforcement by striking down the Euclid suspicious persons ordinance.

CONCLUSION

The ultimate issue in this case is not the scope of police investigative power, but rather, whether after the police have stopped, frisked, searched, arrested and interrogated James Palmer and discovered no evidence of any substantive crime having been committed, the City of Euclid can then convict and imprison him for having aroused suspicion.

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[46] *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 649.

[47] *Task Force Report:* The Courts 103 (1967).

[48] Footnote 45, *supra*, at 124.

The cry of Star Chamber, like the cry of "wolf", has probably been uttered too often and too lightly in the past to have the impact that it should. However, this case and the City of Euclid's suspicious persons ordinance contain, albeit in microcosm, every threat to human liberty posed by that bitter experience. On mere suspicion James Palmer and all other victims of such ordinances are deprived of their liberty, compelled to answer incriminating questions to the satisfaction of officialdom under pain of imprisonment, and required to bear the burden of proving their own innocence of vague suspicion. The Fourth and Fifth Amendments were calculated to prevent just such occurrence and they "run almost into each other"[49] to protect "the right most valued by civilized men" – "the right to be let alone".[50]

These threats to fundamental liberty in the ordinance are made more pernicious by reason of the vagueness which facilitates its discriminatory application in aid of racial separatism. The Fourteenth Amendment was calculated to prevent that.

The Euclid suspicious persons ordinance contains the seeds of destruction of hallowed liberties that respresent the product of 194 years of struggle for human dignity. It must be nullified.

WHEREFORE, it is respectfully urged that the judgment below be reversed.

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August 5, 1970

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[49] *Boyd v. United States*, 116 U.S. 616, 630 (1886).

[50] *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Dissenting opinion of MR. JUSTICE BRANDEIS).

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